Commissioner Scott dissenting:

I respectfully dissent from the majority opinion.

SUMMARY

The Commission has issued an opinion indicating that the California Democratic Party and the California Republican Party (the "Parties") are not subject to the filing requirements of Los Angeles City Ordinances 173930 and 173929 (the "local ordinances") with respect to payments made for member communications to support or oppose candidates in city elections. I disagree with the Commission's analysis on a number of grounds, both substantive and jurisdictional.

With regard to jurisdiction, I do not believe that the Commission has authority to issue an opinion on this matter for two reasons. First, I believe it is outside of the jurisdiction of the Commission to determine whether the Parties must comply with the local ordinances at issue. Second, the determination of how a conflict between an ordinance enacted by a charter city and a state law is to be resolved is a matter of state constitutional law and judicial interpretation, not a matter for interpretation by a state agency.

I also disagree with the substantive analysis of the Commission. As Robert Stern, the former general counsel for the Commission pointed out in his letter to the Commission of June 6, 2001, ("Stern Letter") the issue is "uniformity and simplicity" versus "disclosure." Disclosure is the most important priority of the Political Reform Act. Neither of the terms "uniformity" or "simplicity" are set forth in the Act. Proposition 34 created a loophole in the disclosure laws to be enforced by the Commission. Proposition 34 exempted the Parties from disclosing payments for communications made to its members, even if such communications were made directly on behalf of a particular candidate. In response to this loophole, and in order to preserve the Los Angeles campaign finance law, Los Angeles enacted the emergency ordinances in question requiring disclosure by the Parties. Voters need to know who is supporting or opposing candidates before, not after an election. Uniformity and simplicity are laudable state concerns, but not when they prevent municipal voters from obtaining important information in advance of the election so that they can cast an informed vote.

I. JURISDICTION

A. The Commission Does Not Have Authority To Opine On a Requestor's Duties Under A Local Ordinance.

The case cited by the Commission, *Californians for Political Reform Foundation v. Fair Political Practices Commission (1998) 61 Cal. App.4th 472,* which acknowledges that courts are to give the Commission deference in interpreting the Political Reform Act, is not applicable here because the Commission is interpreting the Parties' duties under the Local Ordinances, not their duties under the Political Reform Act. The California Supreme Court has long held that administrative action must be authorized by an agency's enabling statute.

Actions in excess of that authority are void. (See generally, *Association For Retarded Citizens California v. Department of Developmental Services,* (1985) 38 Cal. 3d 384.)

B. The Determination of Whether Local Ordinances are Preempted by State Law Is a Determination to be Made by the Courts, Not by a State Administrative Agency such as the Commission.

As the Commission points out in the majority opinion at page 7, citing the courts in *Johnson v. Bradley* (1992) 4 Cal.4th 389, and in *CalFed Savings and Loan Assn.,* v. *Los Angeles* (1991) 54 Cal.3d 1, "[t]he question of preemption of a local ordinance by a state law is a constitutional one." As the Supreme Court in *Johnson* and in *CalFed* both indicated, conflicts between state and local government involve issues of legislative supremacy and allocation of power among various levels of government—constitutional issues to be resolved by a court of law and not by a state legislature and therefore, by extension, not to be resolved by an administrative agency that is a creature of state law. As the California Supreme Court explained in *Johnson*, citing the *CalFed* case:

> "The phrase 'statewide concern' is thus nothing more than a conceptual formula employed in aid of the judicial mediation of jurisdictional disputes between charter cities and the Legislature…By requiring, as a condition of state legislative supremacy, a dimension demonstrably transcending identifiable municipal concerns, the phrase resists the invasion of areas which are of intramural concern only, preserving core values of charter city government. As applied to state and charter city enactments in actual conflict, 'municipal affair' and 'statewide concern' represent Janus-like, ultimate legal conclusions rather than factual descriptions. Their inherent ambiguity masks the difficult but inescapable duty of the court to…'allocate the governmental powers under consideration in the most sensible and appropriate fashion as between local and state legislative bodies.'" (*Johnson, supra,* 4 Cal. 4th at pp. 398-399, citing *CalFed, supra,* 54 Cal. 3d at p. 17.)

At another point in the decision, the *Johnson* Court also explained that courts, not legislative bodies, are responsible for defining what is and what is not a matter of statewide concern. (See *Johnson, supra,* 4 Cal. 4th at p. 406.) Although the Commission has great latitude in interpreting the Political Reform Act, the decision of whether state law preempts the local ordinances is a matter for the courts, not for the Commission.

II. TO THE EXTENT THAT THE COURT FINDS A CONFLICT BETWEEN STATE LAW AND THE LOCAL ORDINANCES, THE COURT SHOULD UPHOLD THE LOCAL ORDINANCES.

Once a court determines that there is conflict between state law and the local ordinances, it must determine whether state law preempts the local ordinances. In doing so, the court must determine if the state statute implicates a "statewide concern" and, if so, is reasonably related and narrowly tailored to its resolution.

A. The Local Ordinances Were Passed to Address a Significant Loophole in State Law and to Preserve the Municipal Public Finance System.

As Miriam Krinsky, President of the Los Angeles City Ethics Commission, explained in her letter to the Commission of June 1, 2001, ("Krinsky letter"), the City of Los Angeles has enacted a comprehensive set of campaign finance laws to govern the conduct of its local elections. Since June of 1990, the city has operated under the most extensive campaign finance system of any municipality in the country. An essential component of that system is a voluntary system of limited public financing, a program that was upheld by the California Supreme Court in *Johnson*. As Ms. Krinsky has explained:

> "The ordinances were enacted to help ensure that city elections are open fair and competitive…and by enabling candidates to know when large amounts of unlimited independent expenditures occur in their race. In addition, the system serves to provide voters in the city with information about the types, sources and amounts of expenditures in city races, information that would not be available if the state parties did not have to comply with the ordinances in question. Unless entities that make independent expenditures and payments for membership communications to support or oppose a city candidate are required to notify the city ethics commission as required by these ordinances, candidates cannot know whether the spending limits that are part of the matching funds are lifted in their race. Moreover, voters lose out on valuable information with regard to such expenditures in the election." (Krinsky Ltr., at p. 4)

According to Ms. Krinsky, failure to capture this information undermines the integrity of city elections, hinders the effectiveness of the city charter reforms and prevents the public from obtaining complete and valuable information in time to make an informed decision at the polls. The local ordinances provide for full and fair disclosure at the time it counts to a voter—before the election—and apply equally to all contributors to municipal elections. The significance of independent spending by third party groups has been well documented by two comprehensive studies conducted by the city ethics commission, and in reports submitted by the Parties to the city after the election. (Krinsky Ltr.)

B. The Local Ordinances Fall Within the City's Plenary Authority to Govern Municipal Elections.

Charter cities have a unique constitutional authority in California. Since 1896, when the "home rule" provision was added to the California Constitution, charter cities have had sovereign authority over "municipal affairs." In addition to the general authority to govern municipal affairs, charter cities have plenary authority under the state Constitution over certain "core areas" of city government, including "the manner" of electing city officials. (Cal.Const., art. XI § 5, subd. (b) (4).)

In the *Johnson* case, the Supreme Court addressed the scope of the city's plenary authority and indicated that a charter city's plenary authority to determine the "manner of

electing local officials" is to be interpreted broadly, and includes substantive as well as procedural election provisions. (*Johnson, supra*, 4 Cal. 4th at p. 403.)

C. In Choosing to Participate in City Elections, State Parties Should be Subject to City Rules.

In choosing to participate in the city's elections, state parties should be subject to its election laws, including the reporting and campaign finance laws, in the same manner as such rules apply to all other entities participating in the local election, even though the Parties may have a different status with regard to other rules and other statewide elections.

D. The Statute is Not Sufficiently Tailored to Effectuate the Most Important Statewide Concern--Disclosure.

The Commission cites the importance of a uniform approach to filing requirements for candidates and committees active throughout the state, yet neglects to discuss the most important priority set forth in the Political Reform Act, that of disclosure. (See Govt. Code §§ 81001 and 81002.) As Robert Stern, the first general counsel of the Commission and principal co-author of the Political Reform Act of 1974, explained, "[c]learly the Act was written so that disclosure was the number one priority for its provisions, and the courts and this Commission were instructed to insure that these findings and purposes were implemented." (Stern Ltr., at p. 1). Neither the term "uniformity" nor the term "simplicity" nor similar terms are contained in the provisions of the Act describing its purposes or intent.

As set forth in the documents submitted by the city and in the testimony provided by the city, the purpose of the ordinances was to provide access to information to voters, to the city and to candidates prior to the election. To cast an informed vote, voters need to have access to full information about the range of sources and amounts being spent; the city needs such information to ensure the integrity of the election process; and candidates need such information with regard to the lifting of the limits in their races.

In summary, I agree with the position of the city that payments for "member communication" should not be treated differently than other spending in support or opposition to candidates in the city elections; that the public needs full and timely disclosure of the monies being spent in such races; and that in balancing competing public policy concerns of uniformity and simplicity versus disclosure, the role of the Commission is to see that the disclosure provisions of the Act are implemented.

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Carol Scott,
Commissioner